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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION
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11 PATRICIA DONNELLY,
12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE,
15 COMMISSIONER OF SOCIAL
16 SECURITY ADMINISTRATION,
17 Defendant.

No. CV 06-4702-PLA

MEMORANDUM OPINION AND ORDER

18 I.

19 **PROCEEDINGS**

20 Plaintiff filed this action on August 2, 2006, seeking review of the Commissioner's denial
21 of her applications for Supplemental Security Income payments and Disability Insurance Benefits.
22 The parties filed Consents to proceed before the undersigned Magistrate Judge on September 28,
23 2006, and October 2, 2006. Pursuant to the Court's Order, the parties filed a Joint Stipulation on
24 April 10, 2007, that addresses their positions concerning the disputed issue in the case. The Court
25 has taken the Joint Stipulation under submission without oral argument.

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1 II.

2 **BACKGROUND**

3 Plaintiff was born on November 25, 1954. [Administrative Record (“AR”) at 39.] She has a
4 twelfth grade education and past work experience as, among other things, an office clerk, mail
5 sorter, and receptionist. [AR at 12, 58, 63, 78.]

6 On April 4, 2003, plaintiff filed her applications for Disability Insurance Benefits and
7 Supplemental Security Income payments (the latter protectively filed on March 31, 2003), alleging
8 that she had been unable to work since March 31, 1999, due to depression, seizures,
9 nervousness, and hearing voices. [AR at 39-42, 57, 226-29.] After a denial of her applications,
10 plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). The hearing was held
11 on September 8, 2004, at which time plaintiff appeared with counsel and testified on her own
12 behalf. A vocational expert also testified. [AR at 238-69.] On March 25, 2005, the ALJ determined
13 that plaintiff was not disabled. [AR at 11-19.]¹ When the Appeals Council denied review on June
14 7, 2006, the ALJ’s decision became the final decision of the Commissioner. [AR at 4-6.]

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16 III.

17 **STANDARD OF REVIEW**

18 Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s
19 decision to deny benefits. The decision will be disturbed only if it is not supported by substantial
20 evidence or if it is based upon the application of improper legal standards. Moncada v. Chater,
21 60 F.3d 521, 523 (9th Cir. 1995); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992).

22 In this context, the term “substantial evidence” means “more than a mere scintilla but less
23 than a preponderance -- it is such relevant evidence that a reasonable mind might accept as
24 adequate to support the conclusion.” Moncada, 60 F.3d at 523; see also Drouin, 966 F.2d at

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27 ¹ The ALJ concluded that plaintiff last met the coverage criteria for disability benefits on
28 September 30, 1994. As she is claiming a disability as of March, 1999, the ALJ concluded that
she is not entitled to disability insurance benefits. [AR at 12.] Plaintiff does not challenge this
determination.

1 1257. When determining whether substantial evidence exists to support the Commissioner's
 2 decision, the Court examines the administrative record as a whole, considering adverse as well
 3 as supporting evidence. Drouin, 966 F.2d at 1257; Hammock v. Bowen, 879 F.2d 498, 501 (9th
 4 Cir. 1989). Where the evidence is susceptible to more than one rational interpretation, the Court
 5 must defer to the decision of the Commissioner. Moncada, 60 F.3d at 523; Andrews v. Shalala,
 6 53 F.3d 1035, 1039-40 (9th Cir. 1995); Drouin, 966 F.2d at 1258.

8 IV.

9 THE EVALUATION OF DISABILITY

10 Persons are "disabled" for purposes of receiving Social Security benefits if they are unable
 11 to engage in any substantial gainful activity owing to a physical or mental impairment that is
 12 expected to result in death or which has lasted or is expected to last for a continuous period of at
 13 least twelve months. 42 U.S.C. § 423(d)(1)(A); Drouin, 966 F.2d at 1257.

15 A. THE FIVE-STEP EVALUATION PROCESS

16 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing
 17 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lester v. Chater, 81 F.3d 821,
 18 828 n.5 (9th Cir. 1995, as amended April 9, 1996). In the first step, the Commissioner must
 19 determine whether the claimant is currently engaged in substantial gainful activity; if so, the
 20 claimant is not disabled and the claim is denied. Id. If the claimant is not currently engaged in
 21 substantial gainful activity, the second step requires the Commissioner to determine whether the
 22 claimant has a "severe" impairment or combination of impairments significantly limiting her ability
 23 to do basic work activities; if not, a finding of nondisability is made and the claim is denied. Id.
 24 If the claimant has a "severe" impairment or combination of impairments, the third step requires
 25 the Commissioner to determine whether the impairment or combination of impairments meets or
 26 equals an impairment in the Listing of Impairments ("Listing") set forth at 20 C.F.R., Part 404,
 27 Subpart P, Appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id.
 28 If the claimant's impairment or combination of impairments does not meet or equal an impairment

1 in the Listing, the fourth step requires the Commissioner to determine whether the claimant has
 2 sufficient “residual functional capacity” to perform her past work; if so, the claimant is not disabled
 3 and the claim is denied. Id. The claimant has the burden of proving that she is unable to perform
 4 past relevant work. Drouin, 966 F.2d at 1257. If the claimant meets this burden, a prima facie
 5 case of disability is established. The Commissioner then bears the burden of establishing that the
 6 claimant is not disabled, because she can perform other substantial gainful work available in the
 7 national economy. The determination of this issue comprises the fifth and final step in the
 8 sequential analysis. 20 C.F.R. §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d
 9 at 1257.

11 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

12 In this case, at step one, the ALJ found that plaintiff had not engaged in any substantial
 13 gainful activity since the filing of her application. [AR at 13.] At step two, the ALJ concluded that
 14 plaintiff does not have a “severe” impairment. [AR at 18.] Accordingly, the ALJ determined that
 15 plaintiff was not disabled. [AR at 11-19.]

17 **V.**

18 **THE ALJ’S DECISION**

19 Plaintiff contends that the ALJ’s non-severity finding is not supported by substantial
 20 evidence. Joint Stipulation (“Joint Stip.”) at 3. For the reasons discussed below, the Court agrees
 21 with plaintiff and reverses the ALJ’s decision and remands the case for further proceedings.

22 Plaintiff contends that the ALJ erred in concluding that her mental impairment is not severe,
 23 i.e., that it does not have “more than a minimal [e]ffect on [plaintiff’s] ability to perform basic work
 24 activities.” Joint Stipulation (“Joint Stip.”) at 3. Defendant argues that the ALJ’s finding that
 25 plaintiff’s mental impairment is not severe was proper, as the ALJ based his conclusions in part
 26 on the consultative examiner and state agency physician. Joint Stip. at 8-12.

27 A “severe” impairment (or combination of impairments) is defined as one that significantly
 28 limits physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520, 416.920. It

1 must last or be expected to last for a continuous period of at least 12 months. 20 C.F.R. §§
 2 404.1509, 416.909. The Supreme Court has recognized that including a “severity” inquiry at stage
 3 two of the evaluation process permits the Commissioner to screen out claimants whose
 4 impairments are so slight that they are unlikely to be found disabled even if age, education, and
 5 experience are considered. Corrao v. Shalala, 20 F.3d 943, 949 (9th Cir. 1994), citing Bowen v.
 6 Yuckert, 482 U.S. 137, 153, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987). However, overly stringent
 7 application of the “severity” requirement would violate the statute by denying benefits to claimants
 8 who meet the definition of “disabled.” Corrao, 20 F.3d at 949, citing Bowen v. Yuckert, 482 U.S.
 9 at 156-58 (O’Connor, J., concurring).

10 Accordingly, an impairment should be found to be “non-severe” only when the evidence
 11 establishes merely a slight abnormality, with no more than a minimal effect on ability to work.
 12 Corrao, id., citing Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988)(citing Social Security Ruling
 13 85-28 (1985)). Despite use of the term “severe” here, most Circuits (including the Ninth Circuit)
 14 have held that “the step-two inquiry is a de minimis screening device to dispose of groundless
 15 claims.” Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996), citing Bowen v. Yuckert, 482 U.S.
 16 at 153-54; see also, e.g., Hawkins v. Chater, 113 F.3d 1162, 1169 (10th Cir. 1997); Hudson v.
 17 Bowen, 870 F.2d 1392, 1396 (8th Cir. 1989)(evaluation can stop at step two only when there is
 18 no more than minimal effect on ability to work).

19 Here, plaintiff asserts that the following show her mental impairment to be severe: 1. an
 20 initial diagnosis from Portals Community Corrections of major depression with psychotic features,
 21 a Global Assessment of Functioning score of 50², and the subsequent treatment records [AR at
 22 162-73]; 2. a consultative examination by John Woodard, M.D., from November, 2003, following
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24 ² A Global Assessment of Functioning score is the clinician’s judgment of the individual’s overall
 25 level of functioning. It is rated with respect only to psychological, social, and occupational
 26 functioning, without regard to impairments in functioning due to physical or environmental
 27 limitations. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental
 28 Disorders, 32 (4th Ed. 2000) (hereinafter, “DSM IV”). A rating of 41-50 on the GAF scale indicates
 “[s]erious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR
 any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to
 keep a job).” See DSM-IV, at 34.

1 which he concluded that plaintiff has a depressive disorder, not otherwise specified, and a schizoid
2 personality disorder, with slight to moderate impairments for interacting with the public, slight
3 impairments for interacting with supervisors and co-workers, for maintaining concentration and
4 attention and for withstanding normal work stressors and pressures, as well as for performing
5 detailed complex tasks, and slight to moderate incapacity for completing a normal work week
6 without interruption [AR at 181-84]; 3. the state agency physician who concluded that plaintiff
7 would be moderately limited in her ability to understand and remember detailed instructions, in her
8 ability to carry out detailed instructions, and in her ability to accept instructions and respond
9 appropriately to criticism from supervisors. [AR at 185-86.] The physician limited plaintiff to simple
10 repetitive tasks in a low stress environment. [AR at 187.]

11 The ALJ relied on Dr. Woodard and the state agency psychiatric consultant to conclude that
12 plaintiff does not have a severe mental impairment, as her impairment has "only a slight or slight
13 to moderate impact on her functioning ability," or, as the ALJ reports the state agency psychiatrist
14 concluded, mental impairments that are "mild in severity." [AR at 17.] However, the ALJ omitted
15 relevant assessments by these mental health professionals. Dr. Woodard also concluded that
16 plaintiff had a slight to moderate incapacity to complete a normal work week without interruption.
17 The state agency psychiatrist opined that plaintiff is moderately limited in certain areas, including
18 her ability to accept instructions and respond appropriately to criticism from supervisors. No
19 rationale was provided by the ALJ to reject these limitations. With them, it appears that plaintiff's
20 impairment could have more than a minimal effect on her ability to work.

21 As part of his analysis, the ALJ also completely rejected plaintiff's testimony, finding her not
22 credible. A further evaluation of plaintiff's credibility is in order, as her credibility is directly tied to
23 the severity of her impairments. Plaintiff's allegations can be rejected only upon a finding that
24 plaintiff is malingering (no such finding was made here), or by expressing clear and convincing
25 reasons for doing so. Benton v. Barnhart, 331 F.3d 1030, 1040 (9th Cir. 2003). Some of the
26 reasons provided by the ALJ are suspect, however. The ALJ concluded that plaintiff lied and was
27 inconsistent about her drug use. [AR at 17.] Plaintiff indicated in September, 2003, that she last
28 used cocaine 7 months earlier. [AR at 145-46.] She testified that as of the date of the hearing

(September, 2004) she had been sober for 18 months. [AR at 245-46, 257-58.] These statements are consistent with each other. The ALJ accurately related that plaintiff incorrectly told an evaluator in March, 2001, that she did not use drugs [AR at 17, 89], and denied drug use to Dr. Woodard. [AR at 182.] But the record is ambiguous as to what was asked of her by Dr. Woodard in November, 2003, when she denied illegal drug use. Was Dr. Woodard seeking her current habits, or habits from her past? If current, it appears her response was entirely consistent. [AR at 17, 182.] On the other hand, her response in September 2003, that she last used cocaine nine months prior [AR at 131] is consistent with her statement in March, 2003, that she last used cocaine at the start of 2003. [AR at 170.] Significantly, the ALJ believed in forming his opinion and rejecting plaintiff's credibility that she tested positive for cocaine in May, 2003, during the very time frame when she contends she had stopped using. ("**Notably**, May 2003 treatment records indicate positive urine testing results for cocaine." (emphasis added)). [AR at 15.] The document the ALJ refers to in support, however, is a May 14, 2003, "pre op work up," which includes a screening for cocaine. [AR at 102.] The results of that test for cocaine were **negative**. [AR at 106.]

Whenever an ALJ's disbelief of a claimant's testimony is a critical factor in a decision to deny benefits, as it was here, the ALJ must make explicit credibility findings. Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990); see Albalos v. Sullivan, 907 F.2d 871, 874 (9th Cir. 1990) (implicit finding that claimant was not credible is insufficient). If properly supported, an ALJ's credibility determinations are entitled to "great deference." Green v. Heckler, 803 F.2d 528, 532 (9th Cir. 1986). Here, the reasons given by the ALJ for rejecting plaintiff's complaints at this stage of the sequential analysis "were not substantial enough to meet the 'clear and convincing' standard when balanced against [plaintiff's] doctors' contemporaneous observations, some objective tests and [plaintiff's] subjective complaints." Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005). As the ALJ misconstrued the evidence in a manner that may well have tainted his view of plaintiff's credibility, and as he rejected certain limitations imposed by physicians without explanation, when he accepted other findings of those same physicians, remand is warranted.

VI.

1 **REMAND FOR FURTHER PROCEEDINGS**

2 As a general rule, remand is warranted where additional administrative proceedings could
3 remedy defects in the Commissioner's decision. See Harman v. Apfel, 211 F.3d 1172, 1179 (9th
4 Cir.), cert. denied, 531 U.S. 1038 (2000); Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984).
5 In this case, remand is appropriate to reassess plaintiff's impairment at step two in the sequential
6 evaluative process, and to reevaluate plaintiff's credibility based on a complete and accurate
7 assessment of the evidence of drug use.

8 Accordingly, **IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**;
9 (2) the decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant
10 for further proceedings consistent with this Memorandum Opinion.

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12 DATED: July ___, 2007

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14 PAUL L. ABRAMS
15 UNITED STATES MAGISTRATE JUDGE
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